Supreme Court, U.S.
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No.00-415

In The Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER,

v.

SWISHER INTERNATIONAL, INC., RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE CUSTOMS AND INTERNATIONAL TRADE BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICUS CURIAE

The Customs and International Trade Bar Association ("CITBA")[1], organized in 1919, is a national professional association of lawyers who practice customs and international trade law before federal courts and agencies with jurisdiction over such matters. This brief reflects the judgment of CITBA members reached in the exercise of their profession and is offered solely to assist the Court in determining whether there is any systemic need to grant certiorari in this matter.

SUMMARY OF ARGUMENT

The decision by the United States Court of Appeals for the Federal Circuit ("Federal Circuit") will not have a recurring impact on the administration of customs laws by the United States Customs Service ("Customs"). As a matter of practice, the Federal Circuit's decision in *Swisher Int'l, Inc. v. United States*, 205 F.3d 1358 (Fed. Cir. 2000) ("*Swisher*"), will not cause any confusion among customs law practitioners or the courts, and is not inconsistent with the jurisdictional ruling made by this Court in *United States v. United States*

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[1]Pursuant to Rule 37.6, *amicus* states that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amicus,* its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Counsel for both parties have consented to the filing of this brief.

Shoe Corp., 523 U.S. 360 (1998) (*"U. S. Shoe"*). Furthermore, the administrative remedy promulgated by Customs was fully within the statutory framework authorizing the Harbor Maintenance Tax ("HMT"). The regulations promulgated under the statute contain any limit on the time for a party to seek a refund of the unconstitutional HMT. The Federal Circuit's *Swisher* decision does not alter this remedy and, therefore, there is no reason to grant a petition for a writ of certiorari to review the lack of time limitations on refund claims.

In seeking a petition for a writ of certiorari, the Government is only trying to delay and impede the refunds of an unconstitutional tax. This delay will unnecessarily harm those companies and individuals who have been economically prohibited from maintaining a legal action to obtain refunds of the unconstitutional HMT.

Amicus curiae respectfully requests this Court to deny the petition for a writ of certiorari.

ARGUMENT

I. THE DECISION OF THE FEDERAL CIRCUIT IN THIS CASE WILL HAVE NO RECURRING IMPACT ON THE ADMINISTRATION OF THE CUSTOMS LAWS.

A. The Procedural Dispute Here Is Unique To The Context Of The Export HMT.

In *U. S. Shoe*, this Court unanimously held that the HMT violated the Export Clause of the Constitution, insofar as the HMT applied to exports. The substantive legal issue, regarding whether the HMT may be imposed on exports, has thus been conclusively decided. The instant case involves nothing more than a determination of whether it was proper to follow the procedures established in a regulation, 19 C.F.R. § 24.24(e)(4), promulgated by Customs pursuant to the authority granted to Customs by Congress in the Water Resources Development Act, 26 U.S.C. § 4462 (1994), to claim a refund of the unconstitutional HMT. The current dispute is thus confined solely to the issue of the correct procedures to follow to obtain a refund of the unconstitutional HMT on exports. Especially since the unconstitutionality of the export HMT has now been finally determined by this Court, the decision of the Federal Circuit on the very narrow procedural point actually presented by this case is of no

recurring importance to the routine administration of the Customs laws.

B. The Federal Circuit's Decision Does Not Change Existing Practice And Is Not Inconsistent With The Holding In *U. S. Shoe.*

To the extent that it has any application beyond the narrow facts to which it is bound, there is little likelihood that, as a matter of practice, the Federal Circuit's decision in *Swisher* will cause any confusion among practitioners or the courts regarding the application of 28 U.S.C. § 1581. The relationship between the various subsections of § 1581 is well established, and *Swisher* is well within that established understanding. The Federal Circuit's decision is also not inconsistent with the jurisdictional ruling this Court made in *U. S. Shoe*.

Congressional intent is established here. In enacting 28 U.S.C. § 1581(i), Congress intended to grant the Court of International Trade ("CIT") broad, exclusive jurisdiction over any civil action arising out of import transactions. *Conoco, Inc. v. U.S. Foreign-Trade Zones Bd.*, 18 F.3d 1581, 1586 (Fed. Cir. 1994) ("*Conoco*") (*citing* H.R. Rep. No. 96-1235, at 21, *reprinted in* 1980 U.S.C.C.A.N. 3729, 3732) ("H.R. Rep. No. 96-1235"). The legislative history and the plain language of the statute make it clear that 28 U.S.C. § 1581(i) is intended to broaden, rather than narrow, the jurisdiction of the CIT. *Id.* At the same time, "Congress also indicated that '[s]ubsection (i) is intended only to confer subject matter jurisdiction

upon the court, and not to create any new causes of action not founded in other provisions of law.'" *Phibro Energy, Inc. v. Franklin,* 822 F. Supp. 759, 761 (Ct. Int'l Trade 1993) (*quoting* H.R. Rep. No. 96-1235, at 47, *reprinted in* 1980 U.S.C.C.A.N. 3758-59).

The Government, in its Petition, makes much of the limitation on the CIT's jurisdiction under 28 U.S.C. § 1581(i) stated in *Miller & Co. v. United States*, 824 F.2d 961 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 1041 (1988), but that limitation must be read in context. Indeed, in that very case, while the Federal Circuit held that § 1581(i) should not be relied upon "when jurisdiction under another subsection of § 1581 is or could have been available," *id.* at 963, it went on to qualify that limitation by saying it would apply "unless the remedy provided under the other subsection would be manifestly inadequate." *Id.; see also United States v. Uniroyal,* 687 F.2d 467, 475 (C.C.P.A. 1982); *National Corn Growers v. Baker,* 840 F.2d 1547, 1557 (Fed. Cir. 1988). In other words, if it would be *unfair* to force a party to proceed under one of the other subsections of § 1581, the CIT may, in its discretion, permit the claim to be brought under § 1581(i). A finding that jurisdiction may be invoked under § 1581(i) in one particular case, however, does not necessarily preclude a finding of jurisdiction under another subsection of § 1581 in another case raising a similar legal issue under different factual and procedural circumstances. For example, in *Conoco*, the Federal Circuit held that the CIT had jurisdiction under § 1581(i), notwithstanding the potential availability of jurisdiction under § 1581(b), because pursuit of a

remedy under § 1581(b) in that situation would have been "futile and inappropriate." *Conoco,* 18 F.3d at 1587 (*quoting Leather Goods Manufacturers of America v. United States*, 588 F. Supp. 1413, 1421 (Ct. Int'l Trade 1994). Thus, *Conoco* clearly recognized that *another party* raising the same legal issue as the plaintiff in *Conoco*, *could have* proceeded under § 1581(b), but based on the *particular circumstances* of that case, the court recognized jurisdiction under § 1581(i).

Conoco, in turn, is consistent with a number of prior cases regarding this issue, including cases in which the CIT exercised its discretion to allow two bases of jurisdiction within a single cause of action in the same case. In *Detroit Zoological Soc'y v. United States*, 647 F. Supp. 147 (Ct. Int'l Trade 1986), the plaintiff wished to amend and supplement its complaint to allege jurisdiction over the denial of protests which had occurred after the original complaint was filed. The CIT took into consideration the inconvenience and the time involved in filing a new suit, and permitted the plaintiff to supplement its complaint to add its claims under § 1581(a), in addition to its earlier § 1581(i) claims. *Id.* at 149-50. Similarly, in *Carnival Cruise Lines, Inc. v. United States*, 866 F. Supp. 1437 (Ct. Int'l Trade 1994), the CIT permitted the plaintiff to amend its complaint to include the protests which were denied after the original complaint was filed. As a result, the plaintiff was able to invoke claims under § 1581(a), in addition to its earlier jurisdictional claims under § 1581(i), because dismissing the later claim would be "an empty formalism." *Id.* at 1442.

In practice, the appropriate jurisdictional basis for a given cause of action thus turns on the procedural posture of the particular case, the unique circumstances of the plaintiff, and the discretion of the court. Pursuant to 28 U.S.C. § 2637(d), the CIT has discretion to require exhaustion of administrative remedies or to waive the same. In situations involving 28 U.S.C. § 1581(i), the courts have waived exhaustion where the administrative remedy will be inadequate or futile. For example, in *Conoco* — which involved a challenge to a Foreign-Trade Zones Board decision — exhaustion was waived because the court found that the protest procedure under 28 U.S.C. § 1581(a) would have been ineffective. 18 F.3d at 1587. Because the facts of each case underlying the jurisdictional claims under 28 U.S.C. § 1581 are different, it would be inappropriate to proclaim a single jurisdictional basis for a cause of action that fits all factual scenarios.

The *Swisher* decision is not inconsistent with the holding in *U.S. Shoe*. In *U.S. Shoe*, this Court found that CIT jurisdiction over controversies regarding the administration and enforcement of the HMT "accords with § 1581(i)(4)." 523 U.S. at 366. This Court based its ruling on a circumstance where no protest had been filed, and with the notation that, when "Customs . . . issues no directives . . ." and "merely passively collects HMT payments," then "protests are not pivotal." *Id.* at 365 (internal quotes omitted). This Court did not purport to rule on whether jurisdiction would have been appropriate

under § 1581(a) where there had actually been a denial of a protest filed by some other party, who was only following a regulation that Customs had promulgated. In this case, the procedures followed by Swisher International, Inc. ("Swisher") were clearly set forth in Customs' regulation implementing the HMT, as noted below.

This Court did not hold in *U.S. Shoe* that a party who willingly chose to comply with the specific administrative procedures promulgated by Customs could not seek judicial redress under § 1581(a). Thus, the Federal Circuit's decision that Swisher could properly proceed under that subsection, based on the unique factual and procedural posture of the case, is in not inconsistent with this Court's holding in *U.S. Shoe*.

C. The Procedures At Issue Are Within The Agency's Discretion.

The administrative remedy provided by Customs was fully within the framework fashioned by Congress. When Congress enacted 26 U.S.C. §§ 4461, 4462 — the statute authorizing the HMT — it authorized Customs to promulgate regulations and establish administrative procedures to implement the tax. Pursuant to this authority, Customs promulgated 19 C.F.R. § 24.24 to establish payment and refund procedures. While there are time limits for protesting the denial of refunds, which were followed here, 19 C.F.R. § 24.24 does not contain any limit on the time during which a party may seek a refund in the first instance. This merely follows the

intent of Congress, which, when enacting the HMT, chose not to impose a time limitation on the period during which a claim for a refund could be made. The Federal Circuit's *Swisher* decision does not affect these decisions made by Congress and Customs, and, therefore, there is no reason to grant a petition for a writ of certiorari to review the lack of time limitations on refund claims.

II. THE GOVERNMENT SEEKS TO EVADE THE RESULTS OF THIS COURT'S HOLDING IN *U.S. SHOE*.

As noted above, the underlying constitutional claim has already been decided by this Court. Instead of complying with the Court's decision, however, the Government has sought to delay and impede the application of this Court's holding in the *U.S. Shoe* case by asserting that all manner of procedural obstacles stand in the way of exporters' legitimate claims. The petition at hand is nothing but another attempt at delaying the provision of meaningful relief to the injured exporters.

In particular, the Government's tactics unnecessarily harm those companies and individuals who, while legally entitled to a refund of payments made pursuant to the unconstitutional HMT on exports, have heretofore been economically prohibited by the cost involved in maintaining a legal action to attempt to obtain those refunds. *Swisher,* 205 F.3d at 1368. Exporters that did not have a sufficient amount of payments of the unconstitutional HMT during the statutory

limitations period applicable to claims filed under 28 U.S.C. § 1581(i), however, may well have a sufficient amount of payments since the date of enactment of the HMT law to justify filing *Swisher*-type claims under 28 U.S.C. § 1581(a). For this reason as well, the Court should deny the petition for a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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